DEC 13 [illegible]

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Supreme Court of the United States

October Term, 1920.

No. 190.

MUSCATINE LIGHTING COMPANY,
Appellant,

vs.

CITY OF MUSCATINE, IOWA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT OF THE CASE.

Nature of the Action and the Issues.

This is an appeal from a judgment dismissing an action for an injunction against the enforcement of an ordinance of the defendant city fixing the price of gas. The bill was predicated upon allegations showing that the rate fixed was so low as to fail to then yield plaintiff its actual necessary operating costs and that for a number of years plaintiff's average return therefrom upon the fair value of its property had been less than 4% per annum. The rate

was not fixed in the ordinance by which the Company's franchise was granted **but in a general ordinance devoted entirely to rate fixing passed some years after the granting of the franchise.** It was enacted by the city pursuant to its rate making power as conferred upon it by law (Sec. 725 Code 1897), and was purely a governmental act.

To this bill the defendant interposed an **amended and substituted** answer in two counts (Record 19). Count One thereof alleged that plaintiff was bound by contract to sedd gas within the City of Muscatine as long as its franchise ran at the rates fixed in the ordinance. This contention was predicated upon the allegation that the ordinance complained of was enacted as a substitute for a previous ordinance fixing a lower rate for gas (then the subject of litigation between the parties) and as the result **of a certain written proposal** filed with it by plaintiff. The allegations of the answer upon this point and are important and are as follows (Record 24):

> "The plaintiff was requested to reduce its proposition to writing, which was done and presented to the City Council at a special meeting called on the night of April 29th, 1914, for the purpose of consummating the deal as agreed upon. Agents of plaintiff were present at both of these meetings. * * *
>
> **"The written proposal of plaintiff, a copy of which is hereto attached, marked Exhibit 2 and by this reference made a part hereof, sets**

forth clearly the agreement as made by the parties. * * *

"That the agreement as reached on the afternoon of April 23rd, 1914, was fully and completely carried out by the City Council in strict compliance with the terms thereof as set forth in the said written proposal, (defendant's Exhibit 2), the cause of action above referred to was dismissed by the Muscatine Lighting Company, and the contract fully consummated between the parties, and has been fully complied with in all its terms and conditions by both parties ever since, until the commencement of this action on the part of complainant."

The Company denied that the proposal as submitted tended to show a purpose to contract as to rates—or could be construed as the basis of a contract fixing rates and denied the authority of the city to enter into such a contract.

It appearing to the trial court that if this issue were determined favorably to the city's contention there would be no occasion for examining the allegations as to the confiscatory character of the rate he directed that the action be assigned for trial upon this issue as raised by Count One of the Amended and Substituted Answer, to which the Complainant excepted. Record 43.

The action coming on for trial as ordered, formal concessions were made by the parties establishing the authenticity of the ordinances and docu-

ments which will be referred to in the statement of facts (Record 39) and an offer was made by the city of certain oral proof. Objections to this line of testimony were interposed and sustained and nothing material was thus adduced. (Record 40-41-42.)

It will thus be observed that the issues heard and determined by the trial court were two:

First: Was any contract fixing rates for the franchise term or any other term in fact attempted or intended to be made by the parties?

Second: Had the defendant city any authority whatever to enter into such a contract even though one had been intended?

STATEMENT OF FACTS.

The Proposal.

In view of the allegation of the Answer that "the written proposal of plaintiff, a copy of which is hereto attached, marked Exhibit 2 and by this reference made a part hereof **sets forth clearly the agreement as made by the parties,**" it is of the utmost importance that is be carefully examined and clearly analyzed. (First, it should be stated that these documents must all be read in the light of the following circumstances: Upon the 18th day of December, 1913, conceiving the rate for gas established in the ordinance granting complainant its franchise to be unduly high, the Council passed an ordinance repealing such rate and **fixing the price of gas** at

$1.00 per thousand. (See Record 32, Ex. 1.) An action was at once brought by the Company in the state courts to enjoin the enforcement of this ordinance on the ground that it was confiscatory and in this action a temporary injunction was granted. The Proposal was the outcome of negotiations looking toward a disposition of this litigation.) It appears in the Record upon page 33 and is as follows:

"To the Honorable Mayor and City Council of the City of Muscatine, Iowa.

Gentlemen:

Our attention has been called to the certain gas ordinance entitled:

"'An ordinance fixing the quality of illuminating gas and the price to be charged for same by any corporation, firm, partnership or person furnishing the same to consumers within the City of Muscatine, Iowa.'

And which was passed on its second reading by the City Council on the 23rd day of April, 1914, also,

That certain electric light ordinance entitled:

'An ordinance fixing the price to be charged for electrical energy for lighting by the Muscatine Lighting Company, to consumers in the City of Muscatine, Iowa,' passed on its second reading by the Council on the 23rd day of April, 1914:

Also, that the City on April 23rd, 1914, took proper action authorizing acceptance of the cer-

tain street lighting proposition submitted by the Muscatine Lighting Company to the City Council for consideration.

In consideration of the passing of these three matters by the City Council, and on condition that said ordinances are finally passed and the contract as proposed is entered into for the lighting of the streets, the Muscatine Lighting Company in addition to the granting and giving to the City of Muscatine, free of all charge, gas and electric light to the value of Five Hundred ($500.00) Dollars per annum as provided in section four (4) of an ordinance granting the Citizens' Railway and Light Company, its successors and assigns, the right to construct, operate and maintain gas, electric light, and power plants, and to use the streets, alleys and public places for the transmitting of same as passed March 17th, 1904, further agree to dismiss a certain suit now pending between the company and the City of Muscatine, wherein a temporary injunction has been granted and as a part of said agreement the company shall reimburse the City for all court costs, and attorneys' fees and all costs of publication relating to the dollar gas ordinance and the gas case, in connection with such litigation.

The Muscatine Lighting Company further agrees to enter into a suitable arrangement with the City so as to provide pole space on their poles for the attaching of fire-alarm and police-

call wires. The understanding being, that such installation shall be so arranged as not in any manner interfere with the uses by the company of its poles for its own services.

The Muscatine Lighting Company further agrees to furnish to the City free of charge, three series Tungsten lamps in Weed Park during the park season. To be placed as designated by the city.

The Company further agrees that arrangements will be made at once with the City whereby transfers will be issued to the passengers to and from the local cars in the City of Muscatine and the present interurban cars operating between Davenport and Muscatine. Such transfers to be issued under appropriate rules and regulations as to limitation of time and place as may be provided by the Company.

The Company further agrees that the monthly minimum bill in the electric lighting ordinance shall be reduced from seventy-five cents ($.75) to fifty cents ($.50).

The above conditions demanded by the City of Muscatine are agreed to with the understanding that the ordinances referred to will be passed upon their third and final hearing, in every respect the same as when approved by your honorable body on the 23rd day of April, 1914, with the exception of the reduction in the minimum charge for electric light from seventy-five cents ($.75) to fifty cents ($.50) and as oth-

erwise amended by insertion of "gross" in gas ordinance, section 2, and the proper execution of the City Street Lighting Contract.

Witness our hand and seal this 29th day of April, 1914. Muscatine Lighting Company,
by H. C. Blackwell."

The gas ordinance referred to is the one here attacked. The "certain suit" then pending between the Company and the City wherein a temporary injunction had been granted which was to be dismissed by the Company with reimbursement to the city for all court costs and attorney fees was the suit above mentioned. The other ordinance referred to was an ordinance reducing electric rates **below** those fixed in the ordinance granting the Company its electric franchise.

Analyzed and reduced to concise terms, the things where "were demanded by the City of Muscatine" and which the Company proposed and agreed to do were as follows:

First: To give to the City of Muscatine, free of all charge, gas and electric light to the value of $500.00 per annum.

Second: To dismiss a certain injunction suit pending between the Company and the City concerning the enforcement of the $1.00 gas ordinance and reimburse the City for all its court costs and attorney's fees and costs of publication relating thereto.

Third: To grant to the City upon the complainant's poles space for the attaching of fire alarm and police call wires.

Fourth: To furnish to the City free of charge three series tungsten lamps in Weed Park during the park season.

Fifth: To make arrangements whereby transfers would be issued to and from the local cars of the local street railway company and the interurban cars operating between Davenport and Muscatine. The local cars and interurban cars are operated by different corporations.

Sixth: To reduce the monthly minimum bill for electric light from 75 cents to 50 cents per month.

The things above set forth "demanded by the City of Muscatine," (as carefully recorded in the Proposal) were to be done by the Company in consideration of the execution of the street lighting contract between the Company and the City and passage of the two ordinances upon their third reading.

It will be observed that there was not included in the demands of the city as agreed to by the Company any provision that the Company should accept the rates fixed by the new ordinance in any other light than as set forth in the ordinance, to-wit: As rates fixed by governmental authority and therefore binding as long as conditions permitted the Company to operate thereunder but **not binding if conditions arose which made it impossible for the Company to render service thereunder** and earn a reasonable return upon the fair value of its property.

So important a matter as this certainly should not be read into an instrument by a court.

The Ordinance.

It is next essential that we turn to the ordinance itself. It is set forth in full as Exhibit "A" upon page 12 of the Record but for the convenience of the Court it is here reproduced:

Exhibit "A."

An Ordinance **Fixing** the Quality of Illuminating Gas and **the Price** to be Charged for the Same **by Any Corporation, Firm, Partnership, or Person Furnishing** the Same to Consumers Within the City of Muscatine, Iowa.

Be it Ordained by the City Council of the City of Muscatine:

Section I.

That any corporation, firm, partnership or person, or its successors or assigns, in supplying gas to the inhabitants of the City of Muscatine, Iowa, shall not charge to exceed One Dollar and Ten Cents ($1.10) per thousand cubic feet; providing, however, that said corporation, firm, partnership or person, may charge not to exceed One Dollar and Twenty Cents ($1.20) per thousand cubic feet of gas used by a consumer

who does not pay his bill for said gas by the tenth day of the month succeeding that in which said gas is furnished.

It is further provided that the charge of $1.10 per thousand cubic feet net shall be reduced at the rate of two cents (2c) per thousand cubic feet each year beginning May 1st, 1915, and continuing for a period of five years (5), or until the rate is $1.00 per thousand cubic feet net.

Section II.

The gas to be furnished by any corporation, firm, partnership or person to the inhabitants of the City of Muscatine, shall have an average gross heating value of Five Hundred and Ninety (590) British Thermal Units per cubic foot, with an allowable variation of ten per cent (10%) over or under this figure. The test to determine the heating value aforesaid to be made at the Company's works as the gas passes from such works into the distribution system. And that said test must be made whenever required by the City Council and the City shall have the right at any time to inspect and test said gas by a competent inspector appointed by the City.

Section III.

Be it further provided that said corporation, firm, partnership or person shall furnish

to its consumers for measuring the gas to be used, proper meters free of charge; and further provided that said corporation, firm, partnership or person shall be authorized to charge to its consumers a minimum monthly charge of fifty cents (50c) in those cases and instances where the consumer does not use in any one month, more than fifty cents' (50c) worth of gas computed on the scale of prices hereinbefore mentioned; and said charge of fifty cents (50c) shall include all meter charges.

Section VI.

It is further provided that in those cases where any consumer desires to close his premises for one month or more that said corporation, firm, partnership or person shall, upon written request from such consumer, remove the gas meter from such premises and reinstall the same upon written application by such consumer, without any charge for such removal or reinstallation, and that during the period such meter is thus removed there shall be no minimum monthly charge collected by said company.

Section V.

Any corporation, firm, partnership or person violating any of the provisions of this ordinance, shall, upon conviction thereof, be pun-

ished by a fine of not less than Ten Dollars ($10.00) or more than One Hundred Dollars ($100.00).

Section IV.

This ordinance shall be effective for gas furnished from any after May 1st, 1914.

Section VII.

All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Passed and approved this 29th day of April, 1914.

Harry Kern,
Mayor of the City of Muscatine.

Attest:
H. B. Caple, City Recorder.

It is clear that **the ordinance is in form a governmental act** applicable to and governing any persons natural or artificial who shall vend gas within the city; that it carries appropriate penalties for its violation and **requires the assent of no one** as a prerequisite to its validity or enforcement. It is in fact an act of government fixing the price of gas pursuant to the governmental power possessed by the city. There is not an intimation in it that it shall under any circumstances be considered as a contract or in any other light than as a governmental regulation.

Reading the ordinance in the light of the proposal and the circumstances attending its passage, it is also perfectly clear that it was enacted as a sub-

stitute for the $1.00 ordinance and to end the litigation between the Company and the city by getting the rate above the point of confiscation. It is also clear that the city used the litigation and the attendant circumstances as a method of obtaining from the company certain favorable concessions in addition to those provided in the franchise ordinance. It is equally clear that it was not demanded that the Company agree to be bound by the new rate **as by contract** to the end of its franchise term. The city was expressly prohibited by law from binding itself by contract and **it would be an extraordinary demand under the circumstances to require the Company to assent to be bound as by contract to maintain a rate which the city might alter at will.**

The Decree of the Court.

The decree of the court was rendered upon the 15th day of August, 1919, and dismissed Plaintiff's Bill upon the following finding (Record 43):

> "That the rates complained of by the plaintiff were in fact fixed by contract of the parties, as alleged in count One of said answer, and that said rates are valid and binding upon the plaintiff, regardless of the claim in the plaintiff's petition that the same are confiscatory, and that in view of such contract rates, the facts stated in the Bill of Complaint and amendments thereto, entitle the plaintiff to no relief; such rates being fixed by a contract binding upon the plaintiff

and that for this reason the plaintiff is not entitled to any relief herein, and its Bill of Complaint is dismissed. The Plaintiff excepts."

Thereupon the Company asked that the temporary injunction be continued in force pending an appeal, and it appearing to the Court that the questions involved were sufficiently doubtful to warrant this relief an order was so made, establishing a rate of $1.55 per M pending this appeal. Thus this rate has been and is still being collected and the Company is under bond to make refunds in case the final judgment should so require. There is now a sum of approximately $34,000.00 in this fund.

SPECIFICATIONS OF ERROR

The Appellant alleges that the decree entered in this cause is erroneous and unjust to the Complainant and violates the principles of equity in this:

I.

Because the trial court erred in holding that the rate ordinance of the City of Muscatine, Iowa, passed under date of April 29th, 1914, and being Exhibit "A" of plaintiff's petition, did under the facts as shown in evidence constitute a contract between the City of Muscatine and the complainant, under which the complainant obligated itself to supply gas within said city during the unexpired term

of its franchise at the price therein fixed for the reason that under the undisputed evidence in the record, the said ordinance was purely a legislative enactment of the City of Muscatine passed pursuant to the rate making power delegated to it under the statutes of the State of Iowa, and particularly under Section 725 of the Code of Iowa 1897 as amended and was applicable generally within said city to all persons or corporations selling gas therein and carried penalties for its violation and was not accepted and was not in any respect contractual by the complainant Company.

II.

Because the City of Muscatine at the time of the passage of the rate ordinance of date April 29th, 1914, being Exhibit "A" Plaintiff's Bill, was forbidden by statute, to-wit: Section 725 of the Code of Iowa 1897 as amended to bind itself by a contract fixing any definite rate for any particular time.

III.

Because there is no testimony whatever to support the contention of the defendant and the finding of the Court that the said rate ordinance passed under date of April 29, 1914, being Exhibit "A" attached to plaintiff's Bill, constitute a contract but on the contrary the testimony conclusively shows that the said ordinance was adopted by the City of Muscatine as an ordinance fixing complainant's

rates of charge by law and not by contract and was so understood by this complainant and by the city at the time of its passage and adoption.

IV.

Because the written proposal of the complainant Company under date of April 29, 1914, which is Exhibit "2" attached to defendant's amended and substituted Answer, clearly sets forth in express terms the proposal made by the complainant Company, and the acceptance of such proposal by the defendant city and the said complainant Company was not bound beyond the terms thereof. That under said proposal and the acceptance thereof, there is to be found no agreement whatever upon the part of the complainant that said rate ordinance should be considered in any other manner than as a legislative act of the city, which it would be the duty of the city to amend or repeal at any time that conditions had so changed as to render the rate named therein confiscatory.

V.

Because under the statutes of the State of Iowa, to-wit, Section 725 of the Code of Iowa 1897, the dedefendant city at the time of the passage of said ordinance had not and has not now power or authority to fix the rates of charge of the complainant Company by contract but on the contrary had been delegated and did possess and does now possess full and

complete power to fix such rates by legislative act and its action in the fixing of the complainant's rates by said rate ordinance must be held to have been pursuant to and in the exercise of the legislative power expressly conferred upon it under the statutes of the State of Iowa.

VI.

Because the complainant and the City of Muscatine, Iowa, defendant, were forbidden by the statutes of the State of Iowa, to-wit: Section 725 Code of Iowa 1897, as amended, from entering into any contract binding upon them fixing specifically rates for any definite time.

VII.

Because the District Court of the United States in and for the Southern District of Iowa, Davenport Division, being the trial court, declined and refused to hear the evidence in the case upon all allegations of the Bill of Complaint, and split the plaintiff's cause of action, trying only the issue raised by the first count of defendant's Answer, viz:

The question of whether the ordinance of the City of Muscatine of date April 29th, 1924, was in fact and in law a contract between the said City of Muscatine and the plaintiff Company; thus rendering it impossible for complainant to present its evidence as to the merits of the entire controversy and have the same incorporated as a part of the record of this case upon its appeal.

VIII.

Because the trial court in splitting plaintiff's cause of action and hearing only the issue presented by the first count of defendant's Answer required this plaintiff in order to have the merits of its case passed upon to try another action between it and the defendants when the whole case should have been heard and determined in a single action.

BRIEF OF ARGUMENT.

Regulation by Law and Establishment by Contract.

Regulation of rates as a governmental function and establishment of rates by contract between the utility and the city are quite different things.

Omaha Water Co. v. Omaha, 147 Fed 75, 77 C. C. A. 267, 12 L. R. A. N. S. 736.

Noblesville vs. Noblesville Gas & Light Company, 157 Ind. 162; 60 N. E. 1032.

McQuillin Municipal Corporations, Sec. 1733; Vol. IV; 3699.

Rates fixed by law are always subject to attack if they are so low as to make it impossible for the utility to earn a fair return thereunder upon the fair value of the property it has devoted to the public service.

Smythe vs. Ames, 169 U. S., 466.

Denver vs. Denver Union Water Company, 246 U. S. 178.

Wilcox vs. Consolidated Gas Co., 212 U. S. 19; 52.

Des Moines Gas Co. vs. Des Moines, 238 U. S. 153.

Cedar Rapids Gas Co. vs. Cedar Rapids, 223 U. S. 655.

Rates established by valid contracts between utilities and cities are not subject to attack even though the rate may fail to yield the utility a return upon its property. This is because the courts are powerless to relieve persons from the obligations of contracts voluntarily entered into.

Columbus Railway Power & Light Co. vs. City of Columbus et al., 249 U. S. 399.

Neither is a city permitted to repeal or avoid a rate established by valid contract even though the rate is yielding more than a fair rate of return upon the property of the utility.

Detroit vs. Detroit C. Ry. Co., 184 U. S. 368.

Cleveland vs. Cleveland City Ry. Co., 194 U. S. 519.

Minneapolis vs. Minneapolis St. Ry. Co., 215 U. S. 417.

There can be no such thing as an effective agreement to be bound by the exercise of governmental power by a municipality. An ordinance if valid is binding upon all citizens, whether they agree to be

bound by its terms or not. The obligation it imposes is in no way altered or affected by the spirit in which it is accepted by the members of the community. The acquiescence of the plaintiff appellant (Record p. 33, Exhibit 2) amounts to nothing more than its recognition of the terms of the proposed ordinance.

Iowa Cities and Towns are Empowered to Regulate by Law and Denied Authority to Establish by Contract.

In Iowa, cities and towns are expressly forbidden to contract as to rates of charge for water, gas, or electric servive, by Section 725 Code of 1897, which was in force at the time of the adoption of the ordinance herein attacked, and is still in force. It is as follows:

> "Sec. 725. Regulation of rates and service. They shall have power **to require every individual or private corporation** operating such works or plant, subject to reasonable rules and regulations, **to furnish any person applying therefor,** along the line of its pipes, mains, wires, or other conduits, **with gas, heat, water, light or power,** and to supply said city or town with water for fire protection, and with gas, heat, water, light or power for other necessary public purposes, and **to regulate and fix the rent or rate** for water, gas, heat, light or power; **to regulate and fix the** charges for water meters, gas meters, electric light or power meters, or other device or means

necessary for determining the consumption of water, gas, heat, electric light or power, **and these powers shall not be abridged by ordinance, resolution or contract.''**

This Section has been many times construed by the Supreme Court of Iowa as delegating to cities only the **governmental** power to **fix** rates, and all rates fixed by cities and towns **whether in franchise ordinances or in subsequent ordinances** as in the case at bar, have been held subject to attack on the ground of unreasonableness or confiscation.

Town of Woodward vs. Iowa Ry. & Light Co., 178 N. W. 549, July 6, 1920.

Town of Williams vs. Iowa Falls Electric Co., 185 Iowa 493.

See also:

Selkirk vs. Sioux City Gas & Electric Co., 176 N. W. 301.

Iowa Ry. & Light Co. vs. Jones Auto Co., 182 Iowa 982.

Tipton vs. Tipton Light & Heating Co., 176 Iowa 224.

Cedar Rapids Gas Co. vs. City of Cedar Rapids, 144 Iowa 426.

In the Woodward case above cited, the Electric Company accepted a 25 year franchise in June, 1913. Section 6 of the ordinance by which the franchise was granted specified certain maximum rates which might be charged to consumers. In 1918 the Com-

pany declared its inability to further furnish service at the rates named in the franchise ordinance and charged that such rates had become unreasonable and confiscatory. The town refusing to grant an increase, the Company threatened to discontinue its service. The town then brought the action to enjoin the Company from breaching its alleged contract. The Court held:

1. That all the rights of regulation conferred by Section 725 were governmental and must be so exercised.

2. That it was clear from the statute and its progressive development as shown by a historical review of the preceding acts that cities and towns in Iowa were not authorized to establish rates by contract and had no authority to **establish** unreasonable rates—or to **maintain** rates once reasonble after they became unreasonable or confiscatory in character by reason of changed conditions.

3. That the subject had been fully covered in the Court's preceding decisions.

It therefore affirmed the action of the Trial Court in holding the rates both unreasonable and confiscatory and denying the relief prayed for by the town.

In announcing its opinion, the Court said:

> "The contention that the presumption of reasonable rates continues until new ordinance rates are adopted cannot be sustained. To sustain such contention would be to hold that the utility corporation has no remedy, whatever the

facts might be, if the city council refused to amend the rates. The constitutionality of the ordinance rates, like the constitutionality of a statute, is always open to challenge. **Indeed, the only power conferred by the Legislature upon the city council is the power to establish reasonable rates and not unreasonable ones. To enact unreasonable rates, therefore, is to exceed, not only its constitutional power, but its statutory power as well.** Without dwelling further upon the details of the argument, it is enough to say that the ground herein covered has been fully covered in our previous cases. Cedar Rapids Gas Co. v. City of Cedar Rapids, 144 Iowa, 426, 120 N. W. 966, 48 L. R. A. (N. S.) 1025, 138 Am. St. Rep. 299; Tipton v. Tipton Light & Heating Co., 176 Iowa, 224, 157 N. W. 844; Iowa Railway & Light Co. v. Jones Auto Co., 182 Iowa, 982, 164 N. W. 780; Selkirk v. Sioux City Gas & Electric Co., 176 N. W. 301."

This statute of Iowa is unique insofar as our researches go and its prototype is not found in the legislation of any other State. In effect, it establishes complete "home rule" of utilities by cities and incorporated towns however small. Each council is in effect a utilities commission within its own limited territorial sphere with power to compel and regulate service and to fix and regulate rates of charge. Possessing these broad powers these bodies must exercise them. The welfare of both the consumers and

the utilities demands this. As ratemaking bodies, they can no more absolve themselves from the exercise of their important duties by making so-called contracts with utilities than could a state-wide public utilities commission. This is in effect the holding of the Supreme Court of Iowa.

The Decision of the Supreme Court of Iowa Construing the State Statutes Defining the Powers and Duties of Its Municipal Corporations is Considered as Final by This Court.

This rule announced in a series of cases by the Supreme Court of Iowa in the construction of its own peculiar statute and after a full and mature consideration of its development and historical growth will be considered by the Federal Courts as establishing the law of the State and as of binding force and effect upon them. The rule has perhaps never been better stated than by Chief Justice Marshall in the early case of Elmensdorf vs. Taylor, 10 Wheat. 152. He said:

> "This Court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe which

> professed to be governed by principle would, we presume, undertake to say that the courts of Great Britain or France or of any other nation had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled."

This rule is peculiarly applicable in the case of decisions of the state courts defining the rights, powers, duties and liabilities of its municipal subdivisions. This Court in the early case of Claiborne County vs. Brooks, 111 U. S. 400, 410, said:

> **"It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall pos-**

sess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State."

Williams vs. Eggleston, 170 U. S. 304, 311.

Ennis Waterworks vs. Ennis, 233 U. S. 652.

Crowley vs. Christensen, 137 U. S. 86:92.

Detroit vs. Osborn, 135 U. S. 492:499.

Balkam vs. Woodstock Iron Co., 154 U. S. 177, 188.

Equitable Life Assurance Society vs. Brown, 213 U. S. 25:43.

Fifth Avenue Coach Co. vs. New York, 221 U. S. 467:481.

Old Colony Trust Co. vs. Omaha, 230 U. S. 100: 112.

Williams vs. Gaylord, 186 U. S. 157:167.

Hartford Insurance Company vs. Chicago, etc., Railway Company, 175 U. S. 91, 100.

B. & O. Railway vs. Baugh, 149 U. S. 368:374.

Memphis Street Railway Company vs. Moore, 243 U. S. 229:300.

Norton vs. Shelby County, 118 U. S. 425:441.

Iowa Rule is in Harmony with Decisions of This Court.

The language of Section 725 above quoted does not purport to convey the right to contract. This is

true even though the words "and these powers shall not be abridged by ordinance, resolution or contract" be entirely disregarded.

Home Telephone Company vs. Los Angeles, 211 U. S. 265.

Rogers Park vs. Fergus, 180 U. S. 624.

Knoxville Gas Co. vs. Knoxville, C. C. A. Sixth Circuit, 261 Fed. 283.

In the case of Home Telephone Co. vs. Los Angeles, 211 U. S. 264, 272, in considering the right of the city of Los Angeles to establish telephone rates by contract this Court said:

> "It has been settled by this court that the State may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. Detroit v. Detroit Citizens' St. Ry. Co., 184 U. S. 368, 382; Vicksburg v. Vicksburg Water Works Co., 206 U. S. 496, 508. But for the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear.

and all doubts must be resolved in favor of the continuance of the power."

After announcing the above rule the Court took up the specific provisions of the Los Angeles charter relied upon in support of its claim of power to contract. It read as follows:

"by ordinance * * * to regulate telephone service and the use of telephones within the city * * * and to fix and determine the charges for telephones and telephone service and connections."

In denying that this language was authority for a rate contract the Court said:

"This is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, **but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement.** Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ordinance 'to fix and determine the charges.' **It authorizes the exercise of the governmental power and nothing else.**"

See also:

Rogers Park Water Co. vs. Fergus, 180 U.S. 642.

Freeport Water Co. vs. Freeport City, 180 U.S. 587-599-611.

Danville Water Co. vs. Danville City, 180 U.S. 619.

Owensboro vs. Owensboro Water Works Co., 191 U.S. 358.

Stanislaus County vs. San Joaquin C. & I. Co., 192 U.S. 201.

A Contract Beyond the Corporate Power of Either Party is Invalid.

"To make a valid contract it is necessary to show that both parties are competent to enter into the proposed stipulations. It is a fundamental principle in the law of contracts that to make a valid agreement there must be a meeting of minds, and, obviously, if there be a disability on the part of either party to enter into the proposed contract, there can be no valid agrement. * * * **A contract beyond the corporate power of either party is as invalid as if beyond the corporate powers of both.**"

Louisville & Nashville Railroad Company vs. Kentucky, 161 U. S. 67; 691-692.

Central Transportation Company vs. Pullman Car Company, 139 U. S. 48-60.

McCormick vs. Market Bank, 165 U. S. 538, 549. 550, 551.

California Bank vs. Kennedy, 167 U. S. 362, 367.
Concord First National Bank vs. Hawkins, 174 U. S. 364, 369, 370.
O'Brien vs. Wheelock, 184 U. S. 450, 490.
Thompson on Corporations, Volume 3, Title 20, Section 2765, page 2868.

No Contract Fixing Rates Unalterably and for a Fixed Time was in Fact Made.

The contract, if any, must be found in the written proposal of the Company; the ordinance passed by the city; or in both. There is not a word in any of these documents which in any way attempts to bind either party to the rates fixed in the ordinance for any specific length of time. There is nothing in the instruments to indicate that the city intended to be bound never to reduce the rates fixed by the ordinance **nor is there anything in the instruments to indicate that the Company was to be bound thereby more than by any other governmental act: viz, as long as the rates remained non-confiscatory.**

Proposal, see page 5 hereof, Record 33.
Ordinance, see page 10 hereof, Record 12.
Amended and Substituted Answer, setting up Contract, see page 2 hereof, Record 24.

There is not a word in any of these documents which indicates in any way an intention **to contract as to rates** or to fix them for any **specific length of time.** It is true that the city repealed the $1.00 rate

and enacted the new rate in lieu thereof. It is true that in consideration thereof the Company agreed to pay the costs of the litigation and comply with some other demands made by the city. **It is not true that either party said or did** anything from which the conclusion may be fairly drawn that the rate ordinance was to be considered in any other light than as a governmental or ploice regulation repealable by the city and binding upon the Company at all times unless it could establish that the rates therein fixed were or had become confiscatory.

The Company should not be bound beyond the terms of its written proposal.

Minneapolis & St. Louis Ry. Co. vs. Columbus Rolling Mill, 119 U. S. 149; 151.
Lilley vs. Chicago, 103 U. S. 155.
Kelely Mans Co. vs. Sibley, 137 Fed. 586; 588.
Hawkins vs. Young, 174 Iowa 383; 389.

The things which were **"demanded by the city of Muscatine"** and agreed to by the Company were as follows:

First: To give to the City of Muscatine free of all charge, gas and electric light to the value of $500.00 per annum.

Second: To dismiss a certain injunction suit pending between the Company and the City concerning the enforcement of the $1.00 gas ordinance and reimburse the City for all its court costs and attorney's fees and costs of publication relating thereto.

Third: To grant to the City upon the complain-

ant's police space for the attaching of fire alarm and police call wires.

Fourth: To furnish to the city free of charge three series tungsten lamps in Weed Park during the park season.

Fifth: To make arrangements whereby transfers would be issued to and from the local cars of the local street railway company and the interurban cars operating between Davenport and Muscatine. The local cars and interurban cars are both operated by a separate corporation.

Sixth: To reduce the monthly minimum bill for electric light from 75 cents to 50 cents per month.

A city will not be held to have renounced its right of rate regulation except upon the clearest evidence both as to its authority and its intention so to do. Neither should a utility be held to have contracted to sell gas for a specific price for a long period of years except upon clear proof of its intention so to do—especially in view of the fact that the city was prohibited by law from binding itself by such a contract.

Courts have no power to change a contract, or to make agreements for parties.

Robbins vs. Clark, 127 U. S. 622.
Baltger vs. Raleigh Air Line Ry. Co., 115 U. S. 634.
Morgan County vs. Allen, 103 U. S. 498.

Parties making contracts are presumed to have acted with reference to existing law.

Wilson vs. Rousseau, 4 How. 646.
Bronson vs. Krugie, 1 How. 311.
Connecticut Mutual L. Co. vs. Cushman, 108 U. S. 51.
Bulkley vs. U. S., 19 Wall 37.

The entire trancation herein from the first move of the city in the enactment of the $1.00 gas ordinance is entirely inconsistent with the present claim of the city that the rates were fixed by contract. The $1.00 ordinance was purely a governmental act and was enjoined as such; the new ordinance was similar in form; enacted pursuant to the same statutory authority; contained suitable penalties; required no acceptance or consent; was of general application. It was enacted as a substitute for the one in litigation and the Company's sole connection therewith as shown by its proposal was to yield to certain additional demands of the city. Certainly it was proper for the parties to treat together for the disposition of this litigation and the fixing of a compensatory rate under existing conditions without the Company being forever after bound by the rate thereby established regadless of new conditions rendering the once compensatory rate non-compensatory and confiscatory. Even in adjudicated cases involving rate ordinances decrees either sustaining or denouncing the rate are always regarded without prejudice to the continuing rights of the parties to renew the action under changed conditions:

Lincoln Gas & Electric Light Co. vs. Lincoln, 250 U. S. 256; 268.

Wilcox vs. Consolidated Gas Co., 212 U. S. 19.

Cedar Rapids Gas Co. vs. Cedar Rapids, 223 U. S. 655.

Des Moines Gas Co. vs. Des Moines, 238 U. S. 153.

Missouri vs. Chicago, Burlington & Quincy R. R., 241 U. S. 533; 539.

ARGUMENT.

In a case quite analogous to this, though the claim was there made by the company that it possessed **contract rights** to continue **high rates**, while here the claim is made by the city that it possesses **contract rights** to enforce **low rates**, this Court said:

> "Two questions obviously arise here. Did the City Council have the power to enter into a contract fixing, unalterably, during the term of the franchise, charges for telephone service and disabling itself from exercising the charter power of regulation? If so, was such a contract in fact made? The first of these two questions calls for earlier consideration, for it is needless to consider whether a contract in fact was made until it is determined whether the authority to make the contract was vested in the city."

Home Telephone Co. vs. Los Angeles, 211 U. S. 265; 272.

We have therefore deemed it proper to lay out this argument upon the groundwork so suggested and to first consider the power of the city to enter into a contract fixing these rates.

Had the City Any Power to Enter Into the Alleged Contract?

This question is fairly answered by the statutes of Iowa, Section 725 Code of 1897 reading as follows:

> "Sec. 725. **Regulation** of rates and service. They shall have power **to require every individual or private corporation** operating such works or plant, subject to reasonable rules and regulations, **to furnish any person applying therefor**, along the line of its pipes, mains, wires, or other conduits, **with gas, heat, water, light or power**, and to supply said city or town with water for fire protection, and with gas, heat, water, light or power for other necessary public purposes, and **to regulate and fix the rent or rate** for water, gas, heat and electric light or power; to regulate and fix the charges for water meters, gas meters, electric light or power meters, or other device or means necessary for determining the consumption of water, gas, heat, electric light or power, **and these powers shall not be abridged by ordinance, resolution or contract.**"

It is fairly answered in a series of decisions by the Supreme Court of Iowa of which that in Town of

Woodward vs. Iowa Railway & Light Company, decided on July 6, 1920, 178 N. W. 549, is the latest. It is fairly answered in a series of decisions of this Court of which the Home Telephone Co. vs. Los Angeles, 211 U. S. 265, is one bearing a close analogy to the case at bar in which the rule is announced that a charter provision granting power "by ordinance * * * to regulate telephone service and the use of telephones within the city * * * **and to fix and determine the charges for telephones and telephone service and connections**" is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, **but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement.** Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ordinance "to fix and determine the charges." **It authorizes the exercise of the governmental power and nothing else.**

It is fairly answered by the application of the universal rule, followed both by this Court and the Supreme Court of Iowa, so well announced by Judge Dillon in his work on Municipal Corporations, which reads as follows:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others:

First: Those granted in express words.

Second: Those necessarily or fairly implied in or incident to the powers expressly granted.

Third: Those essential to the declared objects and purposes of the corporations not simply convenient but indispensable. Any fair reasonable doubt concerning the existence of power is resolved by the Courts against the corporation and the power is denied."

Dillon Municipal Corporations, Fourth Edition, Section 89.

Citizens St. Railway vs. Detroit Ry., 171 U. S. 48; 53.

Minturn & Larue, 23 How 435.

Wright vs. Nagle, 101 U. S. 791.

Grand Rapids Electric Light & Power Co. vs. Grand Rapids, C. C. A. 33 Fed. 659.

Knoxville Gas Co. vs. Knoxville C. C. A. 261 Fed. 283.

Town of Arkon vs. McElligott, 166 Iowa, 297.

Heins vs. Lincoln, 103 Iowa 69; 77.

Applying the rule just stated to Section 725 which the Supreme Court of Iowa has always construed as expressly granting full power to fix and regulate rates as a governmental function, it is too obvious to require argument that power to contract

as to rates **is not indispensable.** On the contrary, as pointed out by the Supreme Court of Iowa in the Woodward case, and as many times suggested by this Court, such power is highly undesirable as it may result in rates either so high as to damage the public or so low as to damage or destroy the utility which is an instrumentality so essential to the public welfare as to be impressed with a public interest. Could any system of regulation be devised, more attractive to cities and towns than that established in Iowa under Section 725 of the Code of 1897? It is "home rule" in the highest degree. Under it, the complete power of rate and service regulation is delegated to the municipalities with no limitation whatsoever save that it shall be exercised reasonably. Certainly it is not unduly harsh for the legislature to insist that this power once possessed shall be fairly and courageously exercised for the public welfare? Yet this is all that has been requested of the defendant, which now seeks release from this duty by the claim that it has avoided its performance by contract.

A Contract Beyond the Corporate Powers of Either Party Thereto is Invalid.

No rule has been more consistently adhered to by this Court than that "**if there be a disability on the part of either party to enter into the proposed contract there can be no valid agreement.**"

In the Pullman case, the Court speaking through Mr. Justice Grey said:

> "The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful **and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds:** the obligation of every one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. * * *"
>
> "It was argued in behalf of the plaintiff that, even if the contract sued on was void, because ultra vires and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to this action to recover the compensation agreed on for that period.

"But this argument, though sustained by decisions in some of the states, finds no support in the judgments of this court."

"The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:

"A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it.

"The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

"When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities of its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the con-

tract, can be estopped, by assention to it, or by acting upon it, to show that it was prohibited by those laws."

Central Transp. Co. v. Pullman's Car Company, 139 U. S. Rep. 24-48-49-54-55-59-60.

This decision has been followed without variation by the Supreme Court of the United States.

The following cases are all from cases in which the Court was considering the question of ultra vires acts of corporations. In some of the cases your Honors will observe the question of ultra vires is raised by one corporation party as to itself, and in others as to the opposite corporation party.

"Besides this, however, in order to support the proposed consolidation of these two systems, the parties are bound to show, not only that the L. & N. Co. was competent to buy, but that the Chesapeake Co. was vested with power to sell. To make a valid contract it is necessary to show **that both parties are competent to enter into the proposed stipulations.** It is a fundamental principle of the law of contracts that, to make a valid agreement, there must be a meeting of minds, and, obviously, **if there be a disability on the party of either party to enter into the proposed contract there can be no valid agreement.** As was said by this court in St. Louis Railroad v. Terre Haute Railroad, 145 U. S. 393, 404: 'It is unnecessary, however, to express a definitive opinion upon the question whether a con-

tract between these partis was beyond the corporate powers of the plaintiff, because, as held by the decisions of this court already cited, **a contract beyond the corporate power of either party is as invalid as if beyond the corporate powers of both, and the contract in question was clearly beyond the corporate powers of the defendant.**' See also Thomas v. Railroad Co., 101 U. S. 71; Oregon Railway v. Oregonian Railway Co., 130 U. S. 1; Pennsylvania Railway v. St. Louis, Alton &c. Railway, 118 U. S. 290; Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24."

Louisville & Nashville R'd. v. Kentucky, U. S. Vol. 161, 677, pgs. 691 and 692.

"The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers, **is unlawful and void, and will not support an action, resta, as this court has often recognized and affirmed,** upon three distinct grounds: the obligation of any one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. Pearce v. Madison & Indianapolis Railroad, 21 How. 441; Pittsburgh &c. Railway v. Keokuk & Hamilton Bridge Co.,

131 U. S. 371, 384; Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24, 48.

"When the corporation is created by a charter granted by the legislature, any person dealing with it is bound to take notice of the terms of the charter, and of the general laws restricting or defining the powers of the corporation. Pearce v. Madison & Indianapolis Railroad, above cited; Zabriskie v. Cleveland &c. Railroad, 23 How. 381, 398; Thomas v. Railroad Co., 101 U. S. 71; Pennsylvania Railroad v. St. Louis &c. Railroad, 118 U. S. 290, 630. In like manner, when the corporation is formed under general laws, by the recording or filing in a public office of the required articles of association and certificate, any person dealing with the association is bound to take notice of the documents recorded or filed, upon which, as authorized and controlled by the general laws, depend the existence of the corporation, the extent of its corporate powers, and its capacity to act as a corporation. Oregon Railway v. Oregonian Railway, 130 U. S. 1, 25; Central Transportation Co. v. Pullman's Car Co., above cited.

"It is settled by a long series of decisions of this court, that a lease of a railroad by one railroad corporation to another, **which is beyond the corporate powers of either, is unlawful and void, and cannot be made good by ratification or estoppel,** so as to sustain an action upon the lease; that this is so, not only when the lease is

ultra vires of the lessor, corporation, and therefore open to the objection of disabling it from performing those duties to the public, its performance of which was the consideration upon which it received its charter from the state; but even if the lease is ultra vires of the lessee corporation only, and therefore not open to that particular objection. Thomas v. Railroad Co., of Pennsylvania Railroad v. St. Louis &c. Railroad, Oregon Railway v. Oregonian Railway, and Central Transportation Co. v. Pullman's Car Co., above cited. St. Louis &c. Railroad v. Terre Haute & Indianapolis Ry., 145 U. S. 393-404."

McCormick v. Market Bank, U. S. Rep. Vol. 165, 538, pages 549 and 550 and 551.

"Whatever divergency of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the invalidity of an act which is an ultra vires act. The cases of Thomas v. Railroad Company, 101 U. S. 71; Pennsylvania Railroad v. St. Louis, Alton &c. Railroad, 118 U. S. 290; Oregon Railway & Navigation Co. v. Oregonian Railway Co., 130 U. S. 1; Pittsburgh, Cincinnati &c. Railway v. Keokuk & Hamilton Bridge Co., 131 U. S. 371; Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24; St. Louis &c. Railroad v. Terre Haute & Indianapolis Railroad, 145 U. S. 393;

Union Pacific Railway v. Chicago &c. Railway, 163 U. S. 564, and McCormick v. Market Nat. Bank, 165 U. S. 538, recognize as sound doctrine that the powers of corporations are such only as are conferred upon them by statute."

California Bank v. Kennedy, U. S. Vol. 167, 362, pg. 367.

"The remaining question for our determination is whether the First National Bank of Concord, having, as a matter of fact, but without authority of law, purchased and held as an investment shares of stock in the Indianapolis National Bank, can protect itself from a suit by the receiver of the latter brought to enforce the stockholders' liability, arising under an assessment by the Comptroller of the Currency, by alleging the unlawfulness of its own action.

"This question has been so recently answered by decisions of this court that it will be sufficient for our present purpose, to cite those decisions without undertaking to fortify the reasoning and conclusions therein reached."

Citing and quoting from Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24; California Bank v. Kennedy, 167 U. S. 362, 367; McCormick v. Market National Bank, 165 U. S. 538.

Concord First National Bank v. Hawkins, U. S. 174, 364, 369 and 370.

"Even in the instance of contracts of a corporation beyond the scope of its corporate

powers, the law is well settled in this court that nothing which has been done under them or the action of the courts can infuse any vitality into them. Central Transportation Company v. Pullman Company, 139 U. S. 24."

O'Brien v. Wheelock, U. S. Vol. 184, 430 at page 490.

"Sec. 2768—Strict Doctrine of Ultra Vires. By the strict doctrine of ultra vires is meant that a corporation is not liable upon a contract beyond the powers conferred upon it by the legislature and varying from the objects of its creation as declared in the law of its organization. **This doctrine is administered by the supreme court of the United States, the courts of England and by many courts of last resort in the United States.** Under this rule a corporate contract which is 'ultra vires,' in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no lgal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. **No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.**" General Principles, Ultra Vires. Thompson on

Corporations, Vol. 3, Title Twenty, 2765, page 2868.

The Decisions of the Supreme Court of Iowa Defining the Powers of Municipal Corporations are Considered Final by This Court.

A City is a political subdivision of the State, created for the convenient administration of the government, with powers more or less enlarged, according to the requirements of the public, which may be increased or repealed at the will of the legislature. So far as they are invested with subordinate legislative power for local purposes, they are the mere instrumentalities of the State.

Jefferson City Gas Light Co. v. Clark, 95 U. S. 644.
Meriweather v. Garrett, 102 U. S. 472.
Mobile v. Watson, 116 U. S. 289.
Hill v. Memphis, 134 U. S. 198.

It is a fundamental rule of this Court as announced in Claiborne County vs. Brooks, 111 U. S. 400, 410, that "It is undoubtedly a question of local policy with each State what shall be the extent and character of the powers which its various political and municipal organizations shall possess, **and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States.**"

In many other important decisions are to be found the approval of this rule. From some we shall quote. In the case of Williams vs. Eggleston, 170 U. S., 304, 311, this Court said:

> "When the state court decides that municipal corporations within the territorial limits of the State are subject to the control of the state legislature, and that its act in creating for certain purposes a new corporation, and merging therein five separate towns, was valid, this court cannot hold that the state court was mistaken in its construction of the state constitution or in its declaration as to the extent of the power of the legislature over municipal corporations."

In the case of Ennis Waterworks vs. Ennis, 233 U. S. 652, this Court had before it for consideration, a municipal ordinance of the City of Ennis from which it was contended a certain contract arose. In stating htat the Court should give to the ordinance the interpretation placed upon it by the Supreme Court of Texas, this Court said:

> "This is clearly the case since the doctrine which the premise embodies is subject to this qualification that where a contract which is relied upon arises from a state law or municipal ordinance having the effect of such law, in interpreting for itself such law or ordinance this court will not give to it a meaning in conflict with the settled rule of the State at the time the

law was enacted or the ordinance adopted. In other words, that where we come to consider a contract arising from a state law or ordinance we will treat it as if there was embodied in its text the settled rule of law which existed in the State at the time the state action relied upon as a contract was taken. Burgess v. Seligman, 107 U. S. 20; Warburton v. White, 176 U. S. 484; Gulf & Ship Island R. R. v. Hewes, 183 U. S. 66; Freeport Water Co. v. Freeport, 180 U. S. 587; Great Southern Hotel Co. v. Jones, 193 U. S. 532, 548."

In the case of Crowley vs. Christensen, 137 U. S. 86, 92, this Court said:

"The Constitution of California vests in the municipality of the city and county of San Francisco the right to make 'all such local, police, sanitary and other regulations as are not in conflict with general laws.' The Supreme Court of the State has decided that the ordinance in question, under which the petitioner was arrested and is held in custody, was thus authorized and is valid. That decision is binding upon us unless some inhibition of the Constitution or of a law of the United States is violated by it."

In the case of Detroit vs. Osborn, 135 U. S. 492, page 499, the Court said:

"What was there decided in reference to the powers is equally true as to the liabilities of

a municipal corporation. The City of Detroit, in the discharge of its public duty in respect to keeping the streets and sidewalks in repair, is under no higher or different obligation to a citizen of Ohio than to one of the State of Michigan and the measure of its liability under the statutes, as stated, is to be determined by the judgment of the Supreme Court of that State, and not by what our opinions might be as to the proper construction of those statutes. Reference may also be made to the recent case of Bucher v. Railroad Company, 125 U. S. 555, 584, in which this court followed, against its own judgment of the law, the rulings of the Supreme Court of Massachusetts, and held that a party traveling on Sunday, and not for necessity or charity, in the cars of a railroad company, could not recover for injuries sustained by the negligence of the company, because he was himself thus violating the law of the State. Concluding the opinion of the court in that case, it is observed: 'It may be said generally that whenever the decisions of the state courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the State, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the federal courts.' "

In the later case of Balkan vs. Woodstock Iron Company, 154 U. S. 177, 188, the Court said:

> "The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute and is as binding upon the courts of the United States as the text."

See also:

Equitable Life Assurance Society vs. Brown, 213 U. S. 25, 43.

Fifth Avenue Coach Co. vs. New York, 221 U. S. 467, 481.

To quote further would be superfluous. The Supreme Court of Iowa has constantly announced and adhered to the doctrine that the power conferred by Section 725 is governmental, and that only; that cities and towns have no authority whatever to contract as to rates; and no power to fix or maintain unreasonable rates. Its last word upon the subject in Town of Woodward vs. Iowa Railway & Light Company admits of no further argument.

The Claim That There Was an Attempt to Fix Rates by Contract is Not Warranted.

The contract herein relied upon is in writing. In Count I of its verified amended and substituted answer (the case was tried upon Count I alone, Record 43) it is alleged that

"The written proposal of Plaintiff, a copy of which is hereto attached, marked Exhibit 2 and by this reference made a part hereof, **sets forth clearly the agreement as made by the parties.**"

It is contended that out of the proposal and the adoption of the gas ordinance arose a contract upon the part of the company to manufacture and sell gas during the remainder of its franchise term (fifteen years) at the rates named in the ordinance.

It is also alleged that the instruments "constitute one legal, binding contract **and both parties are bound thereby.**" An analysis of these instruments at once discloses the fatal weakness of the claim thus advance by defendant.

Let us examine these written instruments as they stand, in the light of the surrounding circumstances. The city had enacted a rate fixing ordinance repealing the rate provisions contained in the franchise ordinance and fixing the gas rates at $1.00 per thousand cubic feet. This ordinance was under attack in the courts as being unconstitutional. Negotiations were under way for a disposition of this litigation. The city then enacted the ordinance now in question, which still effected a substantial reduction in the franchise rates. In return for this it made certain demands of the Company to which the Company submitted.

All these demands are set forth in writing.

There is not one of them to which the claim that defendant agreed to be bound **by contract** to the new

rates for the remainder of the franchise term is in the slightest degree referrable.

There is not an intimation in the ordinance that it was considered as contractual or as requiring the assent of anyone as to its validity. It does not refer to the proposal, nor to the Company save as it belonged to the general classes of persons enumerated therein. While the immediate rate reduction was not so great as under the first ordinance it was still substantial and in addition thereto the Company felt compelled to yield to the additional demands enumerated in the proposal. Certainly had the parties intended the execution of so important a **contract as one fixing gas rates** for fifteen years something would have been said about it in these instruments.

Why Say the Contract Period is Fifteen Years?

But why is it said the rate was to continue for 15 years or until the end of the franchise term? **Nothing whatever is to be found in the proposal or ordinance fixing a time during which this rate was to remain effective.** The documents are absolutely silent upon this important matter and defendant may as well urge the contract as being perpetual as being limited to the franchise period.

How long was the rate fixed in the ordinance to remain in force? Obviously until changed by the legislative authorities of the city or set aside by a court of competent jurisdiction as unreasonable and confiscatory. In other words, the ordinance speaks for itself as a purely legislative enactment. Was it not the duty of the Company to confer with the city

in reference to a settlement of the rate litigation? Was it not its duty to exhibit to the city its books of account, and advise with the city as to the rate required to produce essential revenues? Was it not its duty to accept and try out such reasonable rate as might give promise of proving compensatory? All these duties this Court has many times announced as resting upon utilities.

Lincoln Gas & Electric Light Co. vs. Lincoln, 250 U. S. 256, 268.
Wilcox vs. Consolidated Gas Co., 212 U. S. 19.
Cedar Rapids Gas Co. vs. Cedar Rapids, 223 U. S. 655.

For having done this and yielded to certain additional demands is it now to be held that the Company is forever bound **as by contract** to furnish gas at the rates fixed as reasonable under conditions prevailing in 1914?

And this in face of the fact that the city was not and could not be bound for an instant by the alleged contract.

The suggestion that the Company can be bound **beyond the terms of its proposal** and under the circumstances herein disclosed is contrary to equity and natural justice. We respectfully submit that there is nothing in this Record to warrant the claim that there was ever any intention of either party hereto to fix the rates set forth in the ordinance as by contract.

For the errors pointed out we respectfully submit that the decree should be reversed and the case remanded for trial upon the merits.

Respetfully submitted,

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